

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

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Date: September 26, 1997
Case No: 96-INA-148

In the Matter of:

HARDMAN'S AUTO ELECTRIC SERVICE
Employer

On Behalf of:

Domingos Da Cunha Alves
Alien

Appearance: Manuel Horacio Lima De Jesus Esq.
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Domingos Da Cunha Alves ("Alien") filed by Employer Hardman's Auto Electric Service ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, New York, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On October 24, 1993, the Employer filed an amended application for labor certification to enable the Alien to fill the position of auto mechanic in its auto-repair business.

The duties of the job offered were described as follows:

Repair and maintain according to types of engines in cars, buses, trucks, etc. Dismantle carburetors, distributors, etc. Replace parts such as pistons, valves, gears. Remove and fix damaged parts in all units of the car.

No specific education and 2 years experience in the job were required. Wages were \$16.17 per hour. The applicant would supervise 0 employees and report to the Owner. (AF-1-63) 11 applicants were referred by the State employment service.

On August 10, 1995, the CO issued a NOF denying certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(6) in that U.S. applicants were rejected for unlawful reasons, specifically Mr. T. Fullman, Mr. D. Koudelka and Mr. G. Hines, Mr. V. Tyrrell and Mr. G. Balaban. The CO required documentation by employer that these applicants were not qualified, willing or available to perform the duties involved. The latter three applicants, the CO noted gave as reasons for rejection in follow-up interviews, that they did not have certification Employer said was necessary. The CO, also, required documentation of posting of advertisement as well as tear sheets for newspaper ads, pursuant to 20 CFR 656.21(g). (AF-65-68)

Employer, September 18, 1995, forwarded its rebuttal, stating that of the five applicants questioned by the CO from the 11 referred, all were contacted by the employer. Mr. Koudelka showed up for an interview but did not have experience and did not submit telephone numbers of prior employers. Mr. Balaban "...never got as far as making an appointment for interview which he never kept." Mr. Tyrrell called and apparently wanted a telephone interview. "I do not recall having asked this or any other applicant qualifications that were not stated in the forms filed previously in the local office of the Department of Labor." (AF-

On September 20, 1995, the CO issued a Final Determination denying certification. The CO stated that although rejection of Mr. Kouldelka was no longer an issue, the other four applicants all demonstrated resume credentials meeting the employer's experience requirement. All four sent follow up post recruitment response letters which contradicted employer's rebuttal statements. Three of these responded in a similar manner that they were denied a personal interview because they lacked specialized training and or licenses/certifications which were not stated or advertised. (AF-77-79)

On October 27, 1995, Employer filed a request for review and reconsideration of Final Determination. (AF-80-89)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent., Inc. 87-INA-607 (1988). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 88-INA-32. (April 5, 1989) Thus where a CO fails to address contentions raised by Employer on rebuttal, the CO may be reversed. Duarte Gallery, Inc., 88-INA-92 (October 11, 1989).

We believe the CO was correct in denying certification on the narrow basis that employer had not directly rebutted the CO's allegation that independent statements made by three applicants indicating that employer had failed to further interview them because they did not have certification not required in advertising demonstrated that a good faith recruitment effort had not been made.

Where an employer's statements concerning contact of an applicant during recruitment are contradictory to and unsupported by the applicant's statements, the CO may properly give greater weight to the applicant's statements. Jack Abbatiello Landscaping, 96-INA-00032 (June 4, 1997); Robert B. Fry, Jr., 89-INA-6 (Dec.28, 1989). In this case, we accord greater weight to the applicants' statements, which are consistent and credible.

ORDER

The Certifying Officer's denial of labor certification is
AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge